IN THE

Supreme Court of the United States

October Term, 1977

Supreme Court, U. S.
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No. 77-114

WILLIAM J. QUIRK and LEON E. WEIN,
Appellants,

against

MUNICIPAL ASSISTANCE CORPORATION FOR THE CITY OF NEW YORK and THE CITY OF NEW YORK,
Appellees,

and

LOUIS J. LEFKOWITZ,
Attorney General of the State of New York,
Intervenor-Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellee Municipal Assistance Corporation For The City of New York respectfully moves, pursuant to Rule 16 of the Rules of the Court, to dismiss this appeal on the ground that it does not present a substantial federal question or, in the alternative, to affirm the judgment below on the ground that the question presented is so unsubstantial as not to warrant further argument.

Question Presented

Appellants *pro se,* holders of New York City general obligation bonds who have been timely paid all amounts due on those bonds, seek to invalidate New York State legislation which created the Municipal Assistance Corporation For The City of New York ("MAC"), a corporate governmental agency of the State.

In their Jurisdictional Statement, appellants cite numerous provisions of the New York State Constitution (and a great deal of inaccurate matter outside the record), and assail diverse provisions of the MAC statutes and other legislation, which have nothing to do with this case.

The claim raised below and now properly before this Court is far more simple and narrow: Appellants claim that provisions of the MAC legislation breach an *implied* covenant of their contract as City bondholders and therefore violate the Contracts Clause, Art. 1, Sec. 10, of the United States Constitution. The challenged provisions (a) suspend the authority of New York City to impose a local sales tax; (b) impose a new State sales tax; and (c) provide for the appropriation by the State Legislature of the proceeds of that new State sales tax, as well as the State stock transfer tax, to MAC.

The issues posed below were thus: (a) was there an undertaking to maintain these taxes to pay the City's general obligation bonds, and (b) if so, did the Legislature unconstitutionally impair that undertaking by enacting the MAC legislation.

In a unanimous, *per curiam* decision, the New York Court of Appeals held that there was no undertaking. It said:

> "There is no requirement, either in the State Constitution or in any undertaking in the city bonds, that the diverted taxes be continued directly payable to the city. There is not, and never has been, an agreement, express or implied, that the revenues of these taxes be used to repay city bonds." (A 1, *Quirk* v. *Municipal Assistance Corp.,* 41 N.Y. 2d 644, 646, 394 N.Y.S. 2d 842, 843 (1977)).

Thus, the decision below rested entirely on a threshold interpretation of New York State law.

In these circumstances, the sole question now presented is:

> *Whether the New York Court of Appeals erred in ruling, as a matter of New York law, that there is no express covenant with New York City bondholders that the proceeds of the City sales tax and the State stock transfer tax will be available to pay City bondholders, and that no such covenant should be implied from the bonds, the New York State Constitution, or other provisions of State and local law.*

The Court of Appeals' construction of New York law is dispositive. Prior rulings of this Court establish that such determinations of state law by the state's highest court are to be respected "unless manifestly wrong"—flatly inconsistent with prior state court decisions or a "palpable evasion" of the Contracts Clause. *See* pp. 10-12, *infra.* The decision below of the New York Court of Appeals—a court

which has not hesitated to invalidate State legislation in order to enforce the Contracts Clause and the rights of municipal security holders*—is correct, and certainly not "manifestly wrong."

Accordingly, this appeal does not raise a substantial federal question warranting full review and should be dismissed.

Constitutional and Statutory Provisions Involved

The relevant provisions of the United States Constitution, the Constitution of the State of New York, and the MAC legislation are reproduced in a separate Addendum of Constitutional and Statutory Provisions, filed with the Clerk and cited hereinafter as "Add."**

Statement of the Case

The MAC Legislation

In response to New York City's grave fiscal crisis, in June, 1975, the New York State Legislature created MAC to assist New York City "to provide, without interruption, services essential to [its] inhabitants while meeting [its] obligations to holders of [its] outstanding securities"

* *See, e.g., Patterson* v. *Carey,* 41 N.Y.2d 714, 395 N.Y.S.2d 411 (1977) (invalidating, as an impairment of contract, legislation which, by rescinding a toll increase, violated a bond covenant); *Flushing National Bank* v. *Municipal Assistance Corp.,* 40 N.Y.2d 731, 390 N.Y.S.2d 22 (1976) (invalidating, under State law, a moratorium on actions to enforce New York City short-term notes).

** Other references herein are to the Jurisdictional Statement (JS), the Appendix to the Jurisdictional Statement (A), and the Record before the New York Court of Appeals (R).

(Add. 4, Pub. Auth. Law, §3002).* The legislation empowered MAC to render financial assistance to the City by selling its own bonds and notes and paying the net proceeds of such sales to the City, and by issuing its own bonds and notes in exchange for outstanding short-term City obligations (Add. 6-12, Pub. Auth. Law §§3010-13).

The Legislature made available certain state revenues to MAC to pay the principal and interest on its obligations, as follows: A new New York State sales and use tax, of four per cent, was imposed, to be collected within New York City** (Add. 16-21, Tax Law, §§1107-1108). The proceeds of the new State sales and use tax are collected by the State and payable, upon appropriation, to MAC (Add. 29-32, Pub. Auth. Law, §3036; Add. 22-26, State Fin. Law, §§92-b, 92-d). Any surplus proceeds, not required by MAC, are paid to New York City (Add. 25, State Fin. Law, §92-b(3)). If the sales tax proceeds are insufficient, the deficiency is made up, also upon appropriation, with revenues of the State stock transfer tax (Add. 22-25, State Fin. Law, §92-d).† At the

* MAC was established through two acts of the Legislature: (1) the New York State Municipal Assistance Corporation Act, L. 1975, Ch. 168 (Add. 3), which authorizes the creation of municipal assistance corporations generally, provides for their funding, and sets forth their general structure and powers and (2) the Municipal Assistance Corporation For The City of New York Act, L. 1975, Ch. 169 (Add. 26), which specifically created MAC.

These statutes added to and amended the Public Authorities Law, the Tax Law, and the State Finance Law of New York.

** This tax is in addition to a pre-existing statewide New York State sales and use tax of four per cent. (Tax Law, §1105.) Sales in New York City are thus subject to a total State tax of eight per cent.

† Amendments to the MAC legislation added certain State per capita aid as a revenue source for certain MAC obligations (Add. 43-45). Such revenues are not involved in this litigation.

same time, a prior legislative grant to New York City of authority to impose its own sales and use taxes was suspended (Add. 19-21, Tax Law, §§1210(f)-(i), 1212-A(f)-(i)).

To promote the City's fiscal responsibility, MAC's authorization to provide assistance to the City was conditioned upon the City's adoption of specified budgetary and accounting practices. In addition, the City's power to contract short-term indebtedness was restricted (Add. 13, 29, 32-38, Pub. Auth. Law, §§3014, 3035(3), 3037, 3038).

Since its creation, MAC has sold to the public and others more than $3.6 billion of its bonds, and paid all the net proceeds of such sales to the City. By exchanges of MAC bonds for publicly-held New York City short-term notes, MAC has relieved the City of an additional burden of $1 billion.

The Sales and Stock Transfer Taxes

New York City's authority to impose a sales tax was derived from the State Legislature. In deciding to suspend the City's authority to impose that tax, and to provide for appropriation of the State stock transfer tax revenues to MAC, the State Legislature identified revenue sources which have been continually revised to meet the changing needs of the City and State.

New York City was first authorized by the State Legislature to impose a local sales tax, on a temporary basis, in 1934, with the proceeds to be applied *only* for relief (Session Laws of the State of New York, L. 1934, Ch. 873). The City was not authorized to apply sales tax proceeds for general purposes until 1947 (L. 1947, Ch. 278), and not

until 1955 was it authorized to impose such a tax for other than a fixed period of years (L. 1955, Ch. 215). The City's power to impose local sales taxes has been enlarged, reduced, or otherwise modified in virtually every State legislative session since the first enactment. In 1965, indeed, a portion of the City sales tax was "diverted" to the State when the Legislature reduced the City's authority to impose a sales tax from four per cent to three per cent, and imposed a State sales tax (L. 1965, Ch. 93).*

The stock transfer tax has existed since 1909 as a *State* tax, and until July 1, 1965, its proceeds were appropriated for general *State* purposes. Not until 1965 was the State law amended to provide that stock transfer tax revenues "be appropriated to the city of New York," or, to use appellants' parlance, "diverted" to the City. And such appropriation was simply "for the support of local government" (L. 1965, Ch. 91).

Neither by express direction nor implication were the proceeds of either the sales tax or stock transfer tax ever pledged to bondholders. Thus, unlike the City's real estate tax which, as discussed below, is the principal and constitutionally-protected source of payment for City bonds, neither the sales tax nor the stock transfer tax could be termed a traditional source of revenue for payment of City bonds.

To put these taxes in overall context: in fiscal 1974-75, prior to the MAC legislation, the City's sales tax (one of

* In addition, in 1974, when the State Legislature authorized a one per cent increase in the City sales tax to four per cent, it limited the term of the increase to one year (L. 1974, Ch. 368). Thus, the City sales tax was scheduled to be reduced to three percent on June 30, 1975, which reduction was superseded by the MAC legislation.

seventeen local taxes) yielded about $800 million, or less than seven per cent of the City's total revenues of more than $12 billion. Revenues from the stock transfer tax in that year were about $200 million, or less than two per cent of the City's revenues. In contrast, City real estate tax receipts were nearly $3 billion, and federal and State grants totaled approximately $5 billion (R 42).

Since its inception, MAC has utilized substantially less than the total collections from the new State sales tax, and it has not utilized any portion of the State stock transfer tax revenues. The remaining proceeds of the sales tax, and all of the proceeds of the stock transfer tax, have been paid to New York City.

New York City General Obligation Bonds

Because appellants assert that the MAC legislation impairs the contract represented by their bonds, the starting point for analyzing their claims must be the bonds themselves. A copy of a specimen New York City general obligation bond (R 34-35) is reproduced as an Appendix hereto.

The bond contains the following pledge:

> "The faith, credit and taxing power of The City of New York are hereby irrevocably pledged for the punctual payment of principal of and interest on this bond according to its terms."

And an opinion of legal counsel on the reverse side of the bonds explains that the bonds

> "constitute valid and legally binding obligations of the City of New York, and the said City has power and is obligated to levy *ad valorem* taxes for the payment of said bonds and the interest thereon *upon all real property* within said City, subject to taxation by said City, without limitation of rate or amount." (emphasis added.)

Thus, the only reference to a specific tax is to an obligation to levy a real estate tax, unlimited in rate or amount. There is no mention of a sales tax or a stock transfer tax.

Throughout its fiscal crisis, the City has made all interest and principal payments on its bonds.

Proceedings Below

Appellants' complaint (R 10-20), filed in January, 1977, asserts three causes of action, each seeking a declaration that the MAC legislation impaired the contract represented by their New York City bonds, in violation of Article 1, Sec. 10 of the United States Constitution.

First, appellants allege that their bond contract contained a "term" to the effect that New York City had authority to impose a sales tax.* They assert that the MAC legislation, insofar as it "diverts" revenues of the former City sales tax to MAC, violates this alleged term (R 11-16). Second, appellants assert that the appropriation of proceeds of the State stock transfer tax to MAC violates their bond contract, because these proceeds were previously appropriated to New York City (R 16-18).** Third, appellants allege that City budget deficits in 1975-76 and 1976-77 and the MAC legislation somehow violate provisions of the City Charter which allegedly require the City to maintain a balanced budget (R 18-19).†

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* The bond has no such "term." *See* pp. 12-15, *infra*.

** There is no pledge of these revenues in the bond contract. *See* pp. 12-15, *infra*.

† There was no requirement, prior to the MAC legislation, that the City maintain a balanced budget. *See* pp. 18-19, *infra*.

On cross-motions for summary judgment, the New York Supreme Court, Kings County, granted defendants judgment declaring the MAC legislation constitutional. Appellants took a direct appeal to the Court of Appeals of the State of New York, where the case was heard and decided together with a companion case raising essentially the same issues.*

The Court of Appeals affirmed, in a *per curiam* opinion which emphasizes that the real estate tax provides the essential security for payment of City bondholders. The opinion concludes:

> "Plaintiffs' thesis rests on an untenable contention, namely, that city bondholders were entitled to rely on continued collection of the now diverted taxes. Nowhere, however, not in the State Constitution and not in the bonds themselves, is there any requirement that collection of [these] particular taxes be continued. As a consequence, there is no impairment of obligation of contract under the Federal Constitution" (A 3, 41 N.Y. 2d at 647-8).

There is no substantial federal question.

A. The Court of Appeals' construction of New York law is dispositive; it is not "manifestly wrong."

Appellants' contention that their bond contract was impaired in violation of the Contracts Clause raises three questions:

> "first, was there a contract, second, what was its proper construction and effect, and, third, was its obligation impaired by subsequent legislation as enforced by the state court?" *Appleby* v. *New York,* 271 U.S. 364, 379 (1926).

* *Gilman* v. *Municipal Assistance Corp.,* Index No. 1589/77 (N.Y. Sup. Ct., N.Y. Co.). The plaintiff in *Gilman* has not taken an appeal to this Court.

The decision of the Court of Appeals rested on a determination of the first question—is there a contractual promise of the sort alleged by appellants. The Court of Appeals held "no."*

In so holding, the Court of Appeals was interpreting New York law—the provisions of the State Constitution and local law which allegedly imply the covenant asserted by appellants. To be sure, where a claim is asserted under the Contracts Clause, this Court may itself review a state court determination of that state's law to ensure, as Justice Reed said, that the state court has not engaged in "*a palpable evasion* for avoiding a contrary ruling under federal law." *Interstate Pipe Line Co.* v. *Stone,* 337 U.S. 662, 671 (1949) (Reed, J., dissenting on other grounds; emphasis added). *See also Jefferson Branch Bank* v. *Skelly,* 66 U.S. (1 Black) 436, 443 (1861).

However, as this Court held in *Hale* v. *State Bd. of Assessment & Review,* 302 U.S. 95, 100-101 (1937):

> "we lean toward agreement with the courts of the state, and accept their judgment as to such matters *unless manifestly wrong.*" (emphasis added.)

This "manifest error" standard has been reaffirmed on numerous occasions. *See, e.g., Atlantic Coast Line R.R. Co.* v.

* The issue here, therefore, differs sharply from that in *United States Trust Co.* v. *New Jersey,* 431 U.S. 1 (1977), upon which appellants rely. In that case, the Court was faced with the question of what circumstances may justify legislative repeal of an express, conceded, contractual covenant. Here, the court below decided the different and antecedent question whether, under state law, the covenant alleged to be impaired exists at all.

Phillips, 332 U.S. 168, 171 (1947); *Adams Mfg. Co.* v. *Storen,* 304 U.S. 307, 315-316 (1938) (state court's interpretation to be followed unless "plainly wrong"); *New York Rapid Transit Corp.* v. *City of New York,* 303 U.S. 573, 593 (1938); *Phelps* v. *Bd. of Education,* 300 U.S. 319, 323 (1937) ("palpably erroneous").

Thus, this Court will intercede when the state's highest court either blatantly disregards the explicit terms of a contract or makes a clear departure from prior state decisions. *See, e.g., Muhlker* v. *N.Y. & Harlem R.R. Co.,* 197 U.S. 544, 570-571 (1905); *cf. Sauer* v. *City of New York,* 206 U.S. 536, 549 (1907) ("It is an essential part of the plaintiff's case that he should show that his contract *had been interpreted* in the manner he states"; emphasis added).

There is no occasion here for this Court to intercede.

The Court of Appeals' decision not only is consistent with its own prior interpretations of the New York Constitution,* but is, we submit, clearly correct. Its decision surely is not "manifestly wrong." We summarize below some of the principal reasons that support the Court of Appeals decision.

1. The bonds themselves do not covenant that sales and stock transfer taxes will be available for payment of New York City bondholders.

New York City bonds are "general obligation" bonds. As appellants acknowledge (JS 21), unlike "revenue

* For example, in *Wein* v. *City of New York,* 36 N.Y.2d 610, 370 N.Y.S.2d 550 (1975), the Court of Appeals upheld the validity of the Stabilization Reserve Corporation, a New York corporate body similar to MAC, against a variety of state constitutional challenges, including a number of claims repeated here.

bonds," general obligation securities do not pledge, identify, or depend upon any specific tax or revenue, apart from the real estate tax.

In accordance with Article 8, §2 of the New York State Constitution, the only pledge contained in New York City bonds is the pledge of "faith and credit." That section requires that:

> "no indebtedness shall be contracted by any . . . city . . . unless such . . . city . . . shall have pledged its faith and credit for the payment of the principal thereof and interest thereon."

As we have noted, there is no specific tax referred to in the bonds themselves, and the only tax referred to in the legal opinion appended to the bonds is the real property tax. This is in accordance with Article 8, §12 of the State Constitution, which prohibits the Legislature from restricting local power to tax real estate insofar as needed to pay debt.

As the courts of New York and other states have consistently held, the pledge of "faith and credit" is not a pledge of any particular revenues nor an agreement to maintain a particular tax. It is, rather, a pledge that the municipality "will use its resources *as may be authorized or required by law* for the prompt payment of the principal and interest." *State* v. *County of Citrus,* 116 Fla. 676, 694, 157 So. 4, 11 (1934) (emphasis added). The New York Court of Appeals previously noted:

> "[T]he effect of such pledge of 'full faith and credit' is not to create a general or special lien or charge upon the unspecified revenues, moneys or income of the obligor not therein specifically obligated to the pay-

ment of such bonds, but is to acknowledge an indebtedness for the amount of money received as a consideration for the bonds, which indebtedness will become enforceable in an ordinary action, should the special contractual obligation as embraced in the bond itself, fail." *Flushing National Bank* v. *Municipal Assistance Corp.*, 40 N.Y.2d 731, 735, 390 N.Y.S.2d 22, 25-26 (1976), quoting with approval, *State* v. *County of Citrus, supra.*

See also Sacramento Municipal Utility Dist. v. *Spink,* 145 Cal. App. 2d 568, 303 P.2d 46 (Dist. Ct. App. 1956) (upholding "diversion" of revenue stream, which had partially supported prior general obligation bonds, to secure a later issue of revenue bonds).

Thus, the pledge of faith and credit does not require that the State Legislature continue to permit New York City to impose a sales tax (or any other local tax, apart from the real estate tax) or continue to appropriate the proceeds of the State stock transfer tax to New York City.

Indeed, appellants recognize that issuance by a municipality of a general obligation bond cannot put the State Legislature into a fiscal straightjacket *vis-a-vis* its subdivisions. Appellants concede that "the legislature retains full power over taxation. Other than the real estate tax, any tax may be altered from time to time or repealed" (JS 26).

Appellants fail to recognize, however, that it *also* follows that the so-called "diversion" in the challenged MAC legislation is lawful. It is simply the Legislature's exercise, in succession, of its undoubted powers (a) to impose

its own State sales tax, to be collected in New York City;* (b) annually to appropriate receipts from that State tax, like receipts from any State tax, for any proper purpose, including appropriation to a State public benefit corporation such as MAC; and (c) to repeal or suspend the City's authority to impose a sales tax.

In short, the admission that there is legislative power to repeal the City sales tax is also necessarily a concession that a City bondholder has no vested right in it.

The Court of Appeals therefore correctly concluded, in this case:

> "In no way was the city ever committed to maintain sales tax revenues or stock transfer tax revenues for the benefit of its bondholders." (A 2, 41 N.Y.2d at 646-647.)

2. The "first revenues" clause of the State Constitution does not require that particular taxes will be maintained.

Appellants attempt to find in the "first revenues" clause of Article 8, §2, ¶4 of the State Constitution (Add. 1-2) an implied covenant that the City sales tax would be maintained. The New York Court of Appeals has construed the "first revenues" clause to provide

> "that unpaid bondholders for whom moneys have not been appropriated are entitled to have sufficient sums for repayment 'set apart from the first revenues thereafter received and . . . applied to such purposes' " (A 2-3; 41 N.Y.2d at 647).

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* Indeed, the 1934 statute authorizing the City to impose a sales tax was phrased as a grant to New York City of authority to adopt such taxes as the Legislature would have power to impose (L. 1934, Ch. 873).

By its terms, the "first revenues" clause is triggered only if and when the City fails to appropriate funds to pay bondholders—an event which never here occurred.

Appellants, ignoring that condition precedent and the words "thereafter received," contend that the "first revenues" clause sowehow pledges to City bondholders the sales tax revenues which were being collected at the time the City issued its general obligation bonds. But nothing in Article 8, §2 pledges to a City bondholder any *particular* source of revenue or any particular tax, and nothing in that section requires the State to maintain a local sales tax. A city may impose and collect only such taxes as the State Legislature authorizes (N.Y.Const., Art. 9, §2(c)(8)). Therefore, the meaning of the word "revenues" in Article 8, §2—or in appellants' phrase "first lien on all City revenues" (JS 12)*—is such revenues as the City receives "thereafter," *i.e.*, after a failure to make an appropriation. A contention that it refers to all revenues receivable when the City issues a bond would be absurd: half of the City's revenues consist of federal and state grants which both governments regularly alter, amend, or fail to renew.

Moreover, appellants' contention is contrary to the only judicial decision, prior to this case, which construed the

* Appellants seize upon the label "first lien" by taking out of context a sentence from the Notice of Sale of City Bonds (R 37), and other matters outside the record including a letter to the editor written by two City officials (JS 14). In fact, the full contexts of the quotations cited by appellants convey no more than what the State Constitution says and means—*i.e.*, that only the City real estate tax, insofar as needed to pay indebtedness, is protected from legislative restriction or alteration.

At all events, a statement in a letter to the editor of a newspaper does not bind the State Legislature.

"first revenues" clause. In *Van Derzee* v. *City of Long Beach*, 265 App. Div. 1059, 39 N.Y.S.2d 401, 402 (2d Dept. 1943), the Appellate Division of the New York Supreme Court held that

> "[this] constitutional provision *neither establishes nor affects any substantive right* but deals only with a *remedy* afforded to the creditors of the city on its bonded indebtedness. . . ." (emphasis added).

Indeed, not only does the New York State Constitution give the Legislature full power to suspend or remove local taxes (other than the real estate tax), it gives the Legislature an affirmative responsibility to do so under appropriate circumstances—a power and responsibility it exercised in enacting the MAC legislation. Article 8, §12 of the State Constitution (Add. 2) provides:

> "*It shall be the duty of the legislature,* subject to the provisions of this constitution, *to restrict the power of taxation,* assessment, borrowing money, contracting indebtedness, and loaning the credit *of counties, cities, towns and villages,* so as to prevent abuses in taxation and assessments and in contracting of indebtedness by them. . . . *The legislature shall not, however, restrict the power to levy real estate taxes for the payment of interest on or principal of indebtedness theretofore contracted*" (emphasis added).

Thus, we do not contend, as appellants assert (JS 35), that the "first revenues" clause is "an empty provision" which could be rendered nugatory by legislative removal of all City revenues. The State Constitution expressly provides that the Legislature may not remove or restrict the power of the City to levy real estate taxes for the payment of debt. But at the same time the State Con-

situtions permits (and on occasion requires) the Legislature to alter the revenue or taxing powers of any city with respect to all other revenues—whether by repeal, modification, or "diversion."*

The Court of Appeals therefore properly rejected appellants' contentions concerning the "first revenues" clause, saying:

> "this 'first lien' on the city's revenues does not give bondholders the right to insist that any particular existing taxes be maintained or new ones imposed to produce those revenues. It only assures that out of the revenues which are collected, money must be provided to satisfy obligations to the bondholders." (A 3; 41 N.Y.2d at 647.)

3. There was no "balanced budget" covenant.

Appellants also contend that the City's budget deficits in 1975-76 and 1976-77 violate an implied covenant allegedly derived from

> "the New York Constitution and the City Charter (sections 116-128) [which] require the City to maintain a balanced budget" (JS 26).**

The New York Supreme Court, Kings County, found "no merit" (A 5) in appellants' argument, saying:

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* To hold otherwise necessarily would invalidate numerous prior "diversions" of the City sales tax, the State stock transfer tax, and other revenues—"diversions" which have never before been questioned and which are clearly lawful. For example, whenever a City function is taken over by a public authority (*e.g.*, the Transit Authority), City "revenues" (*e.g.*, from sales of subway tokens) which could or would have been available for debt service on City bonds are "diverted." *See also*, p. *7*, *supra*.

** Appellants do not cite—and there does not exist—any provision of the New York State Constitution which requires (or even speaks to) a balanced budget for municipalities.

> "Plaintiffs have not satisfied the court that a balanced budget was intended as, and was understood to be, a term of the contract of indebtedness represented by the City bonds held by plaintiffs" (A 5).

The Court of Appeals apparently regarded appellants' argument as so insubstantial as not to warrant separate discussion in its opinion.

In fact, the City Charter did *not* require a balanced budget at the time the MAC legislation was enacted in June, 1975. To the contrary, a new Charter provision requiring a balanced budget was first adopted in November, 1975, precisely because, theretofore, the City Charter contained no such requirement.*

In any event, it would be absurd to contend that the MAC legislation in any way authorized, or commanded, or contributed to, City budget deficits. In the two-year period of budget imbalances about which appellants complain (fiscal 1975-76 and 1976-77), MAC *reduced* the drain on the City's cash—by $4.6 billion. And as to fiscal years which follow, the MAC legislation affirmatively requires that "the City shall . . . maintain a budget balanced in accordance with . . . accounting principles" (Add. 34-35, Pub. Auth. Law, §3038(4)).

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* The new provision, the last sentence of Section 1516 of the New York City Charter, reads:

> "The [real estate] tax rate shall be such as to produce a balanced budget within generally accepted accounting principles for municipalities."

This provision was adopted upon recommendation of the State Charter Revision Commission for New York City. In its final report, the "summary of major charter *revisions*" (emphasis added) lists, as the very first revision:

> "1. The *budget shall be balanced* using the State Comptroller's accounting principles for municipalities." (R 36; emphasis in original).

4. Appellants' other state law claims are also without merit.

Appellants also recite a variety of New York State Constitutional provisions which they characterize as "bondholder safeguards, evaded by the creation of MAC" (JS 5-6). These additional "safeguards" were not properly raised as claims below, and are not properly before this Court.* As this Court held in *Tacon* v. *Arizona,* 410 U.S. 351, 352 (1973), "[w]e cannot decide issues raised for the first time here." This is especially true where the issues involve the construction of state statutes and the state constitution, *Cardinale* v. *Louisiana,* 394 U.S. 437, 439 (1969).

In any event, appellants' additional State law contentions are frivolous. Only two of their arguments even conceivably could be read to assert claims that the MAC legislation violates appellants' rights as City bondholders. And both of these arguments are based on seriously misleading readings of the New York State Constitution.

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* Of the 10 "bondholder safeguards" listed in the Jurisdictional Statement, only two—(a) the "first revenues" clause (JS 12) and (b) the alleged "balanced budget" requirement (JS 12)—were the basis for allegations in the complaint and for appellants' arguments below.

Five of appellants' claims—that the MAC legislation allegedly evades (a) the "City debt limit" (JS 6), (b) a requirement that the "City can only borrow long-term for capital projects" (JS 6), (c) a limit on "maximum maturity" of City bonds (JS 7), (d) a provision requiring the City to make serial payments of principal on its bonds (JS 8), and (e) the "faith and credit" clause (JS 8)—were first adverted to by appellants, in passing, in the Court of Appeals. Of these, only the "faith and credit" argument, which was properly raised by the plaintiff in the companion case, was discussed in the Court of Appeals opinion.

Three of the claims—that the MAC legislation evades State Constitutional requirements that (a) provide that the City can only borrow short-term in anticipation of revenues or taxes (JS 7), (b) prohibit City liability on bonds of public corporations (JS 9) and (c) prohibit a gift or loan of City credit in aid of a public corporation (JS 11)—are asserted, for the first time, in this Court.

First, appellants seek to twist the prohibition of City liability on bonds of a public corporation into a prohibition of the payment of any "tax funds" to public corporations such as MAC (JS 9-11). The New York State Constitution provides no such thing. Instead, it states that

> "Neither the state nor any political subdivision thereof shall at any time be liable for the payment of any obligations issued by such a public corporation. . . ." (N.Y. Const., Art. 10, §5).

The MAC legislation fully complies with that provision. The MAC legislation (and all MAC bonds) expressly state that neither the City nor the State of New York is liable on MAC obligations (Add. 13, Pub. Auth. Law §3016).

Second, in arguing that the MAC legislation violates Art. 8, §1 of the New York State Constitution, which prohibits a gift or loan of any city's credit, appellants state that "the City's credit, its tax revenues, are the only thing behind MAC bonds" (JS 12). That is simply false: MAC bonds are not backed by the City's credit. Moreover, appellants misconstrue the settled State Constitutional meaning of the word "credit." *See Wein* v. *City of New York,* 36 N.Y.2d 610, 618, 370 N.Y.S.2d 550, 556 (1975).

Appellants' remaining arguments are, essentially, contentions that obligations issued by MAC would have been unlawful, if they had been issued by New York City. The fallacy behind all of these arguments is that the MAC obligations were not issued by New York City.

While they recite numerous State Constitutional provisions, appellants ignore the basic system of protection which the State Constitution affords City bondholders. The Court of Appeals noted:

"What is important is that city bondholders are protected by the State Constitution, which obligates the city to appropriate moneys for the repayment of city bonds, and to exceed normal real estate tax limitations in order to raise the necessary moneys (N.Y. Const., Art. VIII, §2, 10, 12). *In those provisions, which reflect the municipality's traditional source of revenue from its real estate tax levy, lies the constitutionally guaranteed protection of city bondholders.*" (A 2, 41 N.Y.2d at 647; emphasis added.)

As the Court of Appeals held (*Id.*), nothing in the MAC legislation affects, must less impairs, these bondholder protections.

• • • • •

To sum up: the New York Court of Appeals' construction of New York law is more than fully supported; it is in fact correct. It is certainly not "manifestly wrong." Accordingly, the appeal from that decision does not raise a substantial federal question and does not warrant plenary review, which would involve such additional issues as the reasonableness or necessity of the challenged legislation, as in *United States Trust Co.* v. *New Jersey, supra.*

B. The Court of Appeals followed precedents of this Court.

In an attempt to fashion a federal question, appellants assert, erroneously, that the Court of Appeals "failed to apply" this Court's precedents dealing with "repudiated promises" (JS 36).

Appellants rely first upon *Von Hoffman* v. *City of Quincy*, 71 U.S. (4 Wall.) 535 (1866), in which the state legislature attempted to nullify an explicit promise. In that

case, the enabling legislation which authorized the municipality to issue bonds also authorized a *special* tax to be set aside and used *only* for the payment of those bonds. There was thus a specific pledge of particular revenues, which led this Court to invalidate a later statute repealing that *special* tax.

Here, however, there was no specific (or other) pledge made with respect to sales tax or stock transfer tax revenues.

Von Hoffman is therefore inapposite. The relevant precedent is instead *Keefe* v. *Clark*, 322 U.S. 393, 396-397 (1944). In that case, appellant challenged an enactment permitting special districts to exempt certain properties from tax assessments. This enactment, it was claimed, impaired the obligation of outstanding bonds because the bondholders had a right to have taxes levied against *all* property previously taxed. This Court held:

"Before we can find impairment of a contract we must find an obligation of the contract which has been impaired. *Since the contract here relied upon is one between a political subdivision of a state and private individuals, settled principles of construction require that the obligation alleged to have been impaired be clearly and unequivocally expressed.* This rule of construction applies with special force in the case at bar, for the *interpretation of the bond contract urged by appellants would result in a drastic limitation upon the power of [the state] to enact legislation designed to remedy a situation obviously inimical to the interests of both municipal creditors and the general public.*" 322 U.S. at 396-397 (emphasis added).

Here, there obviously is nothing which "clearly and unequivocally express[es]" any convenant on the part of the

State or City to continue to maintain a City sales tax. The decision of the Court of Appeals that such a covenant should not be implied thus is supported, if not compelled, by *Keefe* v. *Clark*.

Appellants also rely on *Mount Pleasant* v. *Beckwith*, 100 U.S. (10 Ott.) 514 (1879), and *Port of Mobile* v. *Watson*, 116 U.S. 289 (1886), which involved the attempted total repudiation of municipal debt, and therefore have no relevance to the facts of this case. Both cases involved, as appellants concede, "dissolved town[s]" (JS 39)—bald legislative attempts to repudiate all municipal debt by abolishing the municipality which contracted the debt while "leav[ing] no adequate means for the payment of the bonds." 116 U.S. at 305.

The New York Legislature has not abolished the City of New York. Instead, it merely repealed one tax, the sales tax—which had produced less than seven per cent of the City's revenues—in a manner which enabled the City to receive more than five times the amount of sales tax revenues actually removed during the period of a major fiscal crisis.* The New York Legislature fully complied with the holdings of *Mount Pleasant* and *Port of Mobile*, for it preserved more than "adequate means" for repayment of City bonds: collections from the real estate tax produce three times the revenue needed to pay debt service on City bonds (R 41-42). And, as the Court of Appeals noted:

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* The Court of Appeals noted the distinction:

> "A different case would be presented if, realistically, the city were stripped of all sources of revenue, other than the real estate tax, and its outcome would be, at this time, unpredictable (*cf. Mobile* v. *Watson*, 116 U.S. 289, 305)." (A 3; 41 N.Y.2d at 647.)

> "Section 12 of article VIII of the State Constitution prohibits the Legislature from restricting the power of a locality 'to levy taxes on real estate for the payment of interest on or principal of indebtedness theretofore contracted' " (A 3; 41 N.Y.2d at 647).

Not only is the amount "left" thus "adequate" to meet the obligations to City bondholders, but the "first revenues" clause of the New York Constitution

> "assures that out of the revenues which are collected, money must be provided to satisfy obligations to the bondholders." (*Id.*)

The MAC legislation, unlike the statutes in *Mount Pleasant* and *Port of Mobile*, is not an attempt to repudiate municipal debt; it is a plan expressly designed to enable the City to honor all of its obligations. And in fact all City bondholders, including appellants, have been paid.

Conclusion

For the foregoing reasons, the appeal should be dismissed for want of a substantial federal question or, in the alternative, this Court should summarily affirm the judgment of the Court of Appeals of the State of New York.

Respectfully submitted,

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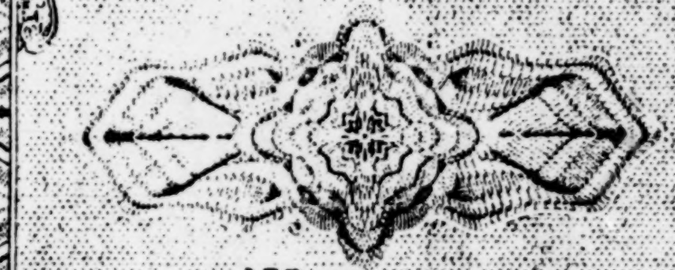
August 31, 1977

APPENDIX

The annexed specimen New York City general obligation bond is reproduced from the Record in the Court of Appeals of the State of New York (R 34-35).



SERIES SR/201-RB
FOR RAPID TRANSIT SYSTEM
ACQUISITION OF OMNIBUSES
AUTHORIZED ISSUE $4,000,000
ISSUE OF AUGUST 1, 1973
INTEREST PAYABLE SEMI-ANNUALLY
FEBRUARY 1 AND AUGUST 1
PRINCIPAL PAYABLE-
FEBRUARY 1,
INTEREST RATE 7%
PER ANNUM
DATED — AUGUST 1, 1973

No

THE CITY OF NEW YORK

SERIAL BOND

THE CITY OF NEW YORK, a municipal corporation of the State of New York, hereby acknowledges itself indebted and for value received promises to pay to

SPECIMEN

or registered assigns on the date specified hereon in lawful money of the United States of America at the office of the Comptroller of The City of New York, in The City of New York, the sum of

DOLLARS

and to pay to the registered owner hereof interest thereon from the date specified hereon or from the interest payment date next preceding the date of this bond, whichever date is later, at the rate specified hereon in like money at said office on the dates in each year specified hereon until such principal shall be paid. This Bond is one of a duly authorized issue of Bonds, the aggregate principal amount of which is stated hereon and is issued pursuant to resolutions duly adopted by the Board of Estimate of the City, and proceedings taken by other boards and officers of said City. The bonds of this issue are issuable as coupon bonds of the denomination of $5,000 and as registered bonds without coupons in the denomination of $1,000 and multiples thereof. This Bond is transferable by the registered holder or his legal representatives only upon presentation of the same at the Office of the Comptroller of The City of New York, together with a written transfer of title which shall be dated and signed by the registered holder or his legal representatives and it shall be duly acknowledged or proved and thereupon a like registered bond will be issued to the transferee in exchange therefor. It is hereby certified and recited that all conditions, acts and things required by the Constitution and Statutes of the State of New York to exist, to occur and to be performed, precedent to and in the issuance of this bond, exist, have occurred and have been performed, and that the issue of bonds of which this is a part together with all other indebtedness of the City of New York is within every debt and other limit prescribed by the Constitution and Laws of the State of New York. The faith, credit and taxing power of The City of New York are hereby irrevocably pledged for the punctual payment of the principal of and interest on this bond according to its terms.

IN WITNESS WHEREOF, The City of New York has caused this bond to be signed by its Mayor or his Clerk and by its Comptroller or his Deputy, and a facsimile of its common seal to be affixed and attested by its City Clerk or his Deputy as of the Bond date specified hereon.

ATTEST:

DEPUTY AND ACTING CITY CLERK.

MAYOR.

COMPTROLLER.

4-3364-113

CERTIFICATION

It is hereby certified that the following is a true and correct copy of the original manually signed opinion dated as of the date of delivery of and payment for the bonds described therein and on file in the office of the Comptroller of The City of New York, New York N. Y.

THIRD DEPUTY COMPTROLLER
The City of New York, New York, N.Y.

LEGAL OPINION

WOOD DAWSON LOVE & SABATINE
48 Wall Street
New York, New York 10005

Honorable Abraham D. Beame
Comptroller
The City of New York
Municipal Building
New York, New York 10007

Dear Sir:

THE CITY OF NEW YORK, NEW YORK,
SERIAL BONDS, ISSUE OF AUGUST 1, 1973

At the request of the purchasers of the within described bonds, we have examined into the validity of Serial Bonds, Issue of August 1, 1973, of The City of New York, New York, issued in coupon form (exchangeable for bonds in registered form), constituting part of a total authorized issue of $331,075,000 bonds, publicly offered and sold by said City July 24, 1973, dated August 1, 1973, of the denomination of $5,000 each, numbered and payable without option of redemption prior to maturity, and bearing interest payable semi-annually February 1 and August 1, as follows:

$4,000,000 Serial Bonds for Rapid Transit System, Acquisition of Omnibuses, numbered SR/201RB-1 through SR/201RB-800, maturing serially in numerical order $1,000,000 bonds on February 1 in each of the years 1975 through 1978, bearing interest at the rate of 7¼ per annum.

We have examined the Constitution and statutes of the State of New York, including the New York City Charter, and certified copies of proceedings of various boards and officers of said City authorizing the issuance of said bonds, also an executed bond of said series.

In our opinion said bonds have been duly authorized and issued in accordance with the Constitution and statutes of the State of New York, including the New York City Charter, and constitute valid and legally binding obligations of The City of New York, and the said City has power and is obligated to levy ad valorem taxes for the payment of said bonds and the interest thereon upon all real property within said City, subject to taxation by said City, without limitation of rate or amount.

It is also our opinion that the interest on said bonds is exempt from taxation by the United States of America under existing law and that under the laws of the State of New York said bonds and the interest thereon are exempt from taxation within said State.

Very truly yours,
WOOD DAWSON LOVE & SABATINE

REGISTERED

SERIES SR/201-RB
FOR RAPID TRANSIT SYSTEM
ACQUISITION OF OMNIBUSES
AUTHORIZED ISSUE $4,000,000
ISSUE OF AUGUST 1, 1973
INTEREST PAYABLE SEMI-ANNUALLY
FEBRUARY 1 AND AUGUST 1
PRINCIPAL PAYABLE-
FEBRUARY 1,
INTEREST RATE 7%
PER ANNUM
DATED — AUGUST 1, 1973

No

SERIAL BOND
OF THE
CITY OF NEW YORK

PAYABLE IN LAWFUL MONEY.

PRINCIPAL AND INTEREST
PAYABLE AT
THE OFFICE OF THE COMPTROLLER
OF THE
CITY OF NEW YORK
IN THE
CITY OF NEW YORK